CITY LIABLE FOR SAFETY OF INFORMER

Schuster v. City of New York,
5 N.Y.2d 75, 154 N.E.2d 534 (1958)

Arnold Schuster supplied information to the police which led to the capture of Willie Sutton, a notorious criminal. The newspapers gave Schuster's role in the capture wide publicity. He received various threats on his life and requested police protection. Three weeks after giving the information he was shot and killed by person or persons unknown. Plaintiff, as administrator, brought a wrongful death action on the theory that the city was under a duty to exercise reasonable care for his son's protection. The trial court's dismissal of the complaint was reversed by the New York Court of Appeals.

The question presented was one of first impression in New York. The court decided that the municipality had the common law duty to exercise reasonable care for the intestate's protection if it reasonably appeared that he was in danger. The decision was bottomed upon the reciprocal duty which citizens have in aiding law enforcement.[1] This note is concerned with the duty placed on the city, the dissenting opinion, and the question of whether such an action could be brought in Ohio.

A municipality does have a basic duty generally to provide for the health, safety and welfare of its citizens. The United States Supreme Court has on several occasions stated the proposition that a government is under the duty to protect its citizens from violence when they give information to the authorities.[2] Thus, once a citizen has performed his obligation of aiding law enforcement, a special duty arises on the part of a city to use reasonable care for the collaborator's protection, at least when it reasonably appears that he is in danger.

When a person has informed and is then injured or killed because

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[1] Historically, there was a duty established by the common law on citizens to aid in law enforcement. Failure to prevent the commission of a felony, or failure to disclose to the proper authorities the knowledge of a felony, constituted the misdemeanor known as "misprision of felony." 1 BURDICK, THE LAW OF CRIME 440 (1946); CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES 486 (6th ed. 1958). See 18 U.S.C. § 4 (1948): "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both." Today the crime of misprision is almost obsolete although the duty to aid law enforcement still exists. "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man." Marbury v. Brooks, 20 U.S. (7 Wheat.) 556,575 (1822). See Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928).

[2] *In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263 (1892); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

of this, it would seem that he or his administrator, under the holding in the principal case, would still have the burden of proving negligence. The law requires four factors in order to maintain a suit based on negligence: (1) a legal duty to conform to a standard of conduct to protect others against foreseeable risks, (2) a failure to conform to the standard, (3) a causal connection between the wrongful conduct and the injury and, (4) a loss or damage.[3]

The collaborator must show that the duty of providing protection was owed to him, and that the city had negligently failed to conform.[4] If it reasonably appeared that the collaborator was in danger, there is no valid reason for distinguishing between negligent action and the negligent failure to act where a duty exists.[5]

Generally, in a negligence action, plaintiff has the burden of pleading and proving the causal connection between the defendant's act or omission and his injury.[6] Plaintiff need not exclude all other possibilities, but is only required to show that defendant's act or omission may be reasonably inferred to be the cause of the injury.[7] The question of proximate cause is normally one for the jury.[8]

The dissenting judges in the *Schuster* case believed that there was no justification in the common law for this extension. They were impressed by the heavy financial burden which the decision might thrust upon municipalities. They stressed that a citizen was under no duty to inform on a criminal and hence the reciprocal duty to provide reasonable protection for the welfare of the informer did not arise.[9]

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[3] PROSSER, TORTS § 35, at 165 (2d ed. 1955).

[4] "Negligence is a failure to comply with a legal duty and, to be a predicate of an action, such duty must be one imposed for the benefit of the person injured. . . ." Meyer Dairy Products Co. v. Gill, 129 Ohio St. 633, 640, 196 N.E. 428, 432 (1935).

[5] ". . . [T]he distinction [between misfeasance and non-feasance] is believed to be without significance as a test of liability." Buskey v. New England Telephone & Telegraph Co., 91 N.H. 522, 523, 23 A.2d 367, 368 (1941).

[6] Alling v. Northwestern Bell Telephone Co., 156 Minn. 60, 194 N.W. 313 (1932).

[7] Ingersoll v. Liberty Bank of Buffalo, 278 N.Y. 1, 14 N.E.2d 828 (1938).

[8] On the facts in this case, the plaintiff might ease his burden of proof especially as to who shot the intestate by a loose application of the *res ipsa loquitur* doctrine. The doctrine applies where the instrumentality is under the exclusive control of the defendant, the nature of the accident is such that it would not ordinarily occur if due care had been exercised and the plaintiff was free of any contributing cause. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934). The majority of the courts hold that after plaintiff has offered proof of the accident and the injury, the jury can draw an inference of negligence or causal connection. Fink v. New York Cent. R.R., 144 Ohio St. 1, 56 N.E.2d 456 (1944). The burden of going forward is then shifted to defendant to disprove his negligence. Foltis v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

[9] For a case which held that a citizen does have a duty to inform, see Attorney General v. Tufts, 329 Mass. 458, 132 N.E. 322 (1921); and see note 1 *supra*. *But see* People v. Lefkovitz, 294 Mich. 263, 293 N.W. 642 (1940).

An additional point made by one of the dissenting judges was that the intestate had assumed the risk: ". . . [T]he reward is the *quid pro quo* not only for the information disclosed but for the assumption of the risks of disclosure as well."[10] Assuming that the collaborator did receive a reward, the defendant city in a negligence action would have the burden of proving that the plaintiff assumed the risk. It must reasonably appear that the plaintiff accepted a risk which he understood, and that he knew the consequences of the risk accepted.[11] But one could analogize the problem here to the one in which a person goes to the rescue of an individual placed in danger by the defendant's act.[12] One author, in writing on rescue and similar situations, felt that moral or social pressures are such as not to warrant, without more, the conclusion that the risk has been assumed.[13]

Should such a factual situation as presented in the principal case arise in Ohio, it is doubtful whether suit could be brought. In New York the problem of sovereign immunity was not present because the state has waived its immunity from suit.[14] Ohio courts allow negligence actions against cities on proprietary functions, but not when governmental functions are involved, unless a statute creates liability.[15] The Ohio Supreme Court has held that the maintenance of a police force is a governmental function, and that negligent acts or omissions of the police department do not subject the city to liability.[16] In an early case the court held that the city was not liable for failure to protect plaintiff's property against mob destruction.[17] This early decision has not been overruled and would appear to be the law today.[18]

The court in a recent decision has adhered to the governmental-proprietary distinction. The majority opinion mentioned that in some cases the municipality should be liable for injuries on governmental functions, but felt that the legislature should remove this barrier.[19] In a wrongful death action where an unattended prisoner suffocated as a

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[10] Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 544 (1958).

[11] Masters v. New York Cent. R.R., 147 Ohio St. 293, 70 N.E.2d 898 (1947); Mudrich v. Standard Oil Co., 86 N.E.2d 324 (Ohio App. 1949).

[12] See Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

[13] HARPER, A TREATISE ON THE LAW OF TORTS 294 (1933).

[14] Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[15] Beebe v. Toledo, 168 Ohio St. 203, 151 N.E.2d 738 (1958); Tolliver v. Newark, 145 Ohio St. 517, 62 N.E.2d 357 (1945).

[16] Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

[17] Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375 (1861).

[18] 53 OHIO OPS. ATT'Y GEN. 733, 738 (1953). OHIO REV. CODE § 3761.03 (1953) provides: "A person assaulted and lynched by a mob may recover, from the county in which such assault is made. . . ." While this statute reaches counties, there is no comparable legislation which specifically applies to cities.

[19] Broughton v. Cleveland, 167 Ohio St. 29, 146 N.E.2d 301 (1958).

result of a fire, the Florida Supreme Court held that a city could be sued where a governmental function was involved.[20] The court felt that the governmental-proprietary distinction was no longer suited to American concepts of justice and should be abandoned.

The decision in the *Schuster* case would, under the facts of the case, appear to be a logical extension of the law. So long as the informer's identity is known to the public, and particularly, known to the criminal element who might be expected to seek revenge, he should be given the fullest possible protection. If the law is to function adequately it needs the aid of citizens. They should be given a reasonable measure of protection so that they will not be discouraged from furthering the enforcement of the criminal laws.

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[20] Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).